

NOTES AND COMMENTS

POLICING THE HIGH SEAS:
THE PROLIFERATION SECURITY INITIATIVE

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In December 2002, Spanish marines, acting on a request from the United States, boarded the *So San*, a North Korean freighter crossing the Arabian Sea.¹ Hidden under the bags of cement listed on the manifest were fifteen Scud missiles.² However, when Yemeni officials declared that they had purchased the missiles, the Spanish and U.S. governments allowed the delivery to proceed.³ White House spokesman Ari Fleischer explained, "We have looked at this matter thoroughly, and there is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea."⁴ Stopping and searching the *So San* was probably legal, because the vessel was not flying a flag and the name and home port on its hull had been obscured.⁵ But seizing the cargo from a properly registered vessel was an entirely different matter.

Neither Yemen nor North Korea was bound by the voluntary guidelines of the Missile Technology Control Regime.⁶ Yemen had ratified the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation,⁷ but North Korea had not. In any event, the scope of that Convention does not extend to the content or destination of cargos. Yemen is one of 145 parties to the United Nations Convention on the Law of the Sea, but

* Canada Research Chair in Global Politics and International Law, University of British Columbia; formerly Professor of Law, Duke University. I am grateful for incisive comments from Donald Childress, Daniel Joyner, Richard Price, Horace Robertson, Eran Shamir-Borer, Ivan Shearer, Scott Silliman, and Nicholas Wheeler, as well as invaluable research assistance from Matthew Droz.

¹ Thom Shanker, *Threats and Responses: Arms Smuggling; Scud Missiles Found on Ship of North Korea*, N.Y. TIMES, Dec. 11, 2002, at A1; see also Thomas E. Ricks & Peter Slevin, *Spain and U.S. Seize N. Korean Missiles; Scuds Were on Ship Bound for Yemen*, WASH. POST, Dec. 11, 2002, at A1.

² David E. Sanger & Thom Shanker, *Threats and Responses: War Materiel; Reluctant U.S. Gives Assent for Missiles to Go to Yemen*, N.Y. TIMES, Dec. 12, 2002, at A1.

³ *Id.*

⁴ *Id.* See also Press Briefing, White House (Dec. 11, 2002), at <<http://www.whitehouse.gov/news/releases/2002/12/20021211-5.html>>. In 1992, the administration of George H. W. Bush took a similar position with respect to two North Korean vessels carrying Scud missiles to Iran. See Patrick E. Tyler, *U.S. Weighs Boarding Korea Arms Ships*, N.Y. TIMES, Mar. 6, 1992, at A10.

⁵ The right of "enquête du pavillon" (or "right to approach") is today normally limited to a verification of the ship's papers against its outwardly manifested identity and nationality. See United Nations Convention on the Law of the Sea, Art. 110, *opened for signature* Dec. 10, 1982, 1833 UNTS 397 (1994) [hereinafter LOS Convention]. The Convention entered into force on November 16, 1994. Following the incident, an unidentified State Department official was reported as saying that the *So San* "had not been flying colors or showing proper identification" and that "under well-accepted principles of customary international law, that meant it was a stateless vessel, therefore, not under the protection of any state and subject to seizure by any navy that chose to do so." He added, however, that in the "final hours before the Spaniards actually conducted their non-permissive boarding of the ship, there was an indication that the master had attempted to declare it to be a Cambodian vessel. And accordingly, we went to the government of Cambodia to seek boarding authority, which they, as the purported flag state, could give. And they did acknowledge that we would be allowed to board." Dep't of State Briefing, Proliferation Security Initiative, Federal News Service, Sept. 9, 2003, *available at* <<http://www.fnsg.com/>>.

⁶ Missile Technology Control Regime, MTCR Partners, at <<http://www.mtcr.info/english/partners.html>>.

⁷ Mar. 10, 1988, 1678 UNTS 221, 27 ILM 668 (1988), *reprinted in* UNITED NATIONS, INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM, UN Sales No. 01.V.3 (2001). UN Conventions on terrorism are also available online at <<http://untreaty.un.org/English/Terrorism.asp>>; see also Status of Conventions—Complete List, at <<http://www.imo.org/home.asp>>.

Article 110 of that treaty stipulates that a ship may be forcibly boarded on the high seas if it is reasonably suspected of engaging in piracy or the slave trade; lacks a flag (i.e., a single country of registration); or is broadcasting in an unauthorized manner toward, or is registered in, the state that wishes to board.⁸ This provision could be relied upon by nonparties such as North Korea, as codifying an unwritten but universally applicable rule of customary international law that does *not* extend to allowing the seizure of *matériel* at sea. The underlying principle of exclusive flag state jurisdiction on the high seas was identified by the Permanent Court of International Justice as long ago as 1927: "It is certainly true that—apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly."⁹

A state may consent to another state exercising jurisdiction over one or more of its vessels; indeed, Article 110 of the Law of the Sea Convention begins: "Except where acts of interference derive from powers conferred by treaty . . ." ¹⁰ Such delegations of jurisdiction are increasingly common, particularly with respect to vessels suspected of smuggling drugs.¹¹ Yet the requirement of flag state consent, and the reluctance of some states to provide consent, create an opportunity for those who would traffic in the world's most dangerous weapons. Traffickers can take advantage of flags of convenience—registering their vessels in states that provide little in the way of regulation and oversight—or use vessels flagged by states that steadfastly refuse to consent to the exercise of high seas jurisdiction by others. North Korea, with its long-range missiles and active nuclear program, is the proliferating state of greatest concern; potential recipients include Iran, Syria, and a variety of terrorist groups and other nonstate actors.¹²

Shipments by air pose similar problems. The airspace above a country's territory is subject to its jurisdiction, but venture offshore and the regime of high seas freedom of overflight applies: beyond twelve nautical miles (the territorial sea), an aircraft may not be forced to land by other states unless it is unregistered or engaged in piracy.¹³

Key members of the U.S. government were clearly rankled by having to release the *So San*. President George W. Bush himself was described as "a very, very unhappy man."¹⁴ Yet the release of the vessel was reflective of the seriousness with which the high seas regime is taken by the United States. That regime forms the legal foundation for the global mobility of U.S. forces.¹⁵ And U.S. merchant vessels, whether flagged at home or abroad, depend on the protection afforded by the requirement of flag state consent, as do foreign vessels carrying goods

⁸ LOS Convention, *supra* note 5, Art. 110. *See id.*, Art. 58, para. 2 (incorporating by reference Art. 110 and other relevant provisions of the high seas regime into the regime of the exclusive economic zone). A list of parties to the LOS Convention can be found at <http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm>.

⁹ *S.S. Lotus Case (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 9, at 25 (Sept. 7). Further evidence of the principle may be found in Article 92(1) of the LOS Convention, *supra* note 5: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas." Article 92 repeats verbatim the text of Article 6 of the Geneva Convention on the High Seas, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82, also available at <<http://fletcher.tufts.edu/multi/texts/BI1364.txt>>.

¹⁰ LOS Convention, *supra* note 5, Art. 110.

¹¹ *See discussion, infra* pp. 538–40.

¹² *See, e.g., Counter-Proliferation: Practising to Provoke*, *ECONOMIST*, Sept. 20, 2003, at 41.

¹³ *See Kay Hailbronner, Freedom of the Air and the Convention on the Law of the Sea*, 77 *AJIL* 490 (1983); NICHOLAS GRIFF, *PUBLIC INTERNATIONAL LAW IN THE AIRSPACE OF THE HIGH SEAS* 7–16, 46–63 (1994).

¹⁴ Sanger & Shanker, *supra* note 2.

¹⁵ *See* Testimony on the Military Implications of the United Nations Convention on the Law of the Sea, U.S. Senate Committee on Armed Services Hearing, Apr. 8, 2004, available at <<http://armed-services.senate.gov/>>; Written Statement of William H. Taft IV, Legal Adviser, Dep't of State Before the House International Relations Committee on May 12, 2004, Concerning Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention, U.S. House of Representatives Committee on International Relations Hearing, May 12, 2004, available at <http://www.house.gov/international_relations/108/taf051204.htm>.

to or from the United States. The *So San* incident demonstrated the need to curtail the opportunities available to traffickers of weapons of mass destruction (WMD) and associated technologies under the existing rules, while retaining the benefits to those engaged in less threatening forms of trade. John Bolton, Undersecretary of State for Arms Control and International Security, was tasked with leading a multilateral response. The result is the Proliferation Security Initiative (PSI), a collective effort to strengthen the political commitment, practical capacities, and legal authorities necessary to stop, search, and, if necessary, seize vessels and aircraft believed to be transporting "weapons of mass destruction, their delivery systems, and related materials."¹⁶

The analysis that follows focuses on the maritime aspects of PSI, measuring the initiative against existing international law and considering its potential as an impetus for legal change. It explains that much of PSI involves nothing more than the consistent and rigorous application of existing rights under national and international law. Concurrently, the initiative promotes the development of new legal authorities by way of bilateral and multilateral treaties. Finally, and less obviously, PSI may lead to new rights under customary international law.

Several analogous historical developments are examined with a view to predicting whether and where the initiative will result in new international law. This inquiry suggests that the treaty-making aspects of PSI will succeed, but not with respect to all states, and that there is not much prospect for a new rule of customary international law specific to the high seas interdiction of missiles and WMD. As a result, the problem of nonconsenting states such as North Korea will remain, leaving those wishing to take high seas action against vessels flying such flags with three options: securing a United Nations Security Council resolution that authorizes interdiction; claiming that the vessels pose a threat that falls within the scope of an existing, or evolving, customary international law right of preemptive self-defense; or simply violating international law. At the moment, all three options remain available to the United States.

The analysis closes with a brief assessment of the broader value of PSI in a world struggling to cope with multiple concerns, including the combined threat of WMD and global terrorism on the one hand, and the vicissitudes of U.S. power on the other. It concludes that the initiative, while less than ideal, represents an appropriate and practical response to a very real problem.

I. PROLIFERATION SECURITY INITIATIVE

Announced by President Bush in Krakow, Poland, on May 31, 2003, PSI now comprises fifteen countries: Australia, Britain, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Russia, Singapore, Spain, and the United States.¹⁷ Five rounds of talks have already taken place in Madrid, Brisbane, Paris, London, and Lisbon, the most recent on March 4–5, 2004.¹⁸ "Operational experts" meetings were held in Washington and Ottawa, in

¹⁶ Press Release, White House, Principles for the Proliferation Security Initiative (Sept. 4, 2003), available at <<http://www.state.gov/t/np/rls/prst1/23809.htm>>. See DEPT. OF STATE, PROLIFERATION SECURITY INITIATIVE: STATEMENT OF INTERDICTION PRINCIPLES, Sept. 4, 2003, available at <<http://www.state.gov/t/np/rls/fs/23764.htm>>. For a report of official acknowledgment of the link between the release of the *So San* and PSI, see Nicholas Kraley, *U.S. Seeks Asian Aid for Ship Searches*, WASH. TIMES, June 18, 2003, at A1.

¹⁷ See Steven R. Weisman, *U.S. To Send Signal To North Koreans In Naval Exercise*, N.Y. TIMES, Aug. 18, 2003, at A1; Richard Boucher, State Department Spokesman, Taken Questions, Proliferation Security Initiative—Paris Meeting of Core Participants, September 3–4, 2003 (Sept. 2, 2003), available at <<http://www.state.gov/r/pa/prs/ps/2003/23673.htm>>; Remarks by the President on Weapons of Mass Destruction Proliferation, Fort Lesley J. McNair—National Defense University, Washington, D.C., Feb. 11, 2004, available at <<http://www.whitehouse.gov/news/releases/2004/02/20040211-4.html>>; *Russia Joins Washington's WMD-Security Initiative*, ORLANDO SENTINEL (Fla.), June 1, 2004, A8.

¹⁸ See PROLIFERATION SECURITY INITIATIVE, CHAIRMAN'S STATEMENT AT THE FIFTH MEETING, Mar. 5, 2004, available at <<http://www.state.gov/t/np/rls/other/30960pf.htm>>.

December 2003, and April 2004, respectively.¹⁹ So far, states have agreed to exchange information concerning suspected proliferation, to review and strengthen their national laws, and to undertake a number of specific interdiction measures.²⁰

Apart from not trafficking in missiles and WMD themselves, these measures include cooperating in the search and seizure of suspect vessels that are flying the flags of participating states, searching suspect foreign vessels that enter their ports, denying transit rights to suspect aircraft, and requiring any such planes that do enter their airspace to land for inspection.²¹ Six small-scale operational exercises have taken place, including several mock interdictions at sea, and further exercises are planned.²²

In addition to the fifteen confirmed PSI-member states, two other countries—Denmark and Turkey—sent representatives to the December 2003 operational experts meeting.²³ Some sixty other countries, although not yet joining PSI, have reportedly agreed to cooperate on an ad hoc basis if a “rogue” ship or aircraft enters their territorial waters or airspace.²⁴

Most importantly, PSI has already produced results. In late September 2003, U.S. and British intelligence services learned that a German-owned freighter, the *BBC China*, was on its way to Libya carrying thousands of parts for gas centrifuges of a kind that can be used to enrich uranium. They notified the German government, which asked the ship’s owner to divert the freighter to an Italian port where the suspect containers were then seized. This successful operation—which was not legally contentious because the vessel voluntarily came into port and the centrifuges were not on the manifest²⁵—has subsequently been credited with encouraging Libyan leader Muammar el-Qaddafi to abandon his WMD programs.²⁶

II. EXISTING INTERNATIONAL LAW

All the PSI measures agreed upon so far are consistent with existing international law. There is nothing that prevents a state from granting permission to board and search vessels flying its flag or to require aircraft of its registry to land for inspection. For example, on December 11, 2001, a multilateral treaty entered into effect under which fifty-one countries accorded each other the right to board and inspect fishing vessels flagged by other states parties in “any high seas area covered by a subregional or regional fisheries management organization or arrangement . . . for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement.”²⁷ Similarly, a number of bilateral treaties accord stop and search

¹⁹ *Id.*

²⁰ See PROLIFERATION SECURITY INITIATIVE: STATEMENT OF INTERDICTION PRINCIPLES, *supra* note 16.

²¹ *Id.*

²² See PROLIFERATION SECURITY INITIATIVE, CHAIRMAN’S STATEMENT AT THE FIFTH MEETING, *supra* note 18.

²³ *The New Multilateralism*, WALL ST. J., Jan. 8, 2004, at A22; *Proliferation Security Initiative: Libyan Case Cynics First Year’s Achievements*, NISEXPORT CONTROL OBSERVER 25, 26 (Dec. 2003/Jan. 2004), available at <<http://cns.miis.edu/pubs/nisexcon/>>.

²⁴ *Id.*

²⁵ See *infra* note 36.

²⁶ Robin Wright, *Ship Incident May Have Swayed Libya; Centrifuges Intercepted in September*, WASH. POST, Jan. 1, 2004, at A18; *U.S. Seized Shipload of Nuclear Equipment Bound for Libya in October*, N.Y. TIMES, Jan. 1, 2004, at A7. Cf. Seymour M. Hersh, *The Deal: Why Is Washington Going Easy on Pakistan’s Nuclear Black Marketers?* NEW YORKER, Mar. 8, 2004, at 32 (reporting that Libya itself may have informed Britain and the United States of the shipment); William J. Broad & David E. Sanger, *After Ending Arms Program, Libya Receives a Surprise*, N.Y. TIMES, May 29, 2004, at A6 (reporting that the U.S.-led team conducting the seizure missed one container of centrifuge components, which was subsequently handed over by Libya).

²⁷ Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Art. 21(1), UN Doc. A/CONF.164/37, 34 ILM 1542, at 1563 (1995), available at <http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm>. Article 21(5) allows the inspecting state to secure evidence where “there are clear grounds for believing that a vessel has engaged in any activity contrary to” those measures, and, if a flag state fails to respond or take action once being notified of an apparent violation, Article 21(8) allows the inspecting state, “where appropriate,” to bring the offending vessel to port. See discussion, *infra* pp. 536–38.

powers with respect to vessels on the high seas believed to be smuggling drugs.²⁸ States could and should, by way of bilateral treaties or one or more multilateral treaties, agree to do the same with respect to vessels suspected of WMD proliferation activities.

On February 11, 2004, the United States and Liberia, the world's second largest shipping registry after Panama, signed the first treaty of this kind.²⁹ In it, the two countries accord each other the right, on the high seas, to board, search, detain, and seize the cargo of any vessel that is reasonably suspected of trafficking in missiles or WMD.³⁰ The agreed right to interdict is provided without prejudice to other rights under international law that might also allow for boarding, and it can normally be exercised only if a request for authorization is first made to the flag state. But the treaty also stipulates that authorization may be presumed, if such a request is made and two hours pass without a response. Moreover, the treaty explicitly foresees that its terms could provide a template for similar agreements between Liberia and other states, opening the door to a series of identical bilateral agreements between that country and all the PSI members. As it happens, Liberia does not have a navy. Yet despite the apparent absence of actual reciprocity, this technically reciprocal treaty is entirely legal—and it will help to close a potentially important path for the high seas traffic in missiles and WMD. A similar bilateral treaty, concluded between the United States and Panama on May 12, 2004, extends the reach of U.S. antiproliferation efforts yet further.³¹ The conclusion of multiple new bilateral treaties could be augmented through the amendment of existing multilateral instruments: the Missile Technology Control Regime could be transformed into a legally binding treaty, or the Suppression of Unlawful Acts Convention—the scope of which already is under review—could be extended to criminalize the transport of WMD, their delivery systems, and related materials on merchant vessels.³² The United States has proposed amendments to this effect that would permit the search and seizure of suspect vessels. One amendment would require that an effort be made to contact the flag state before interdicting, with consent being presumed if four hours passed without a response.³³

A more traditional but less expedient approach might involve the negotiation of a new multilateral treaty. As with the 1995 Straddling Stocks Agreement,³⁴ this could conceivably take the form of a protocol to the Law of the Sea Convention, which is currently being considered

²⁸ See discussion, *infra* pp. 538–40. There is also a recent bilateral treaty allowing for the high seas interdiction of vessels suspected of carrying illegal migrants. See Agreement Between the Government of the United States of America and the Government of the Dominican Republic Concerning Maritime Migration Law Enforcement, May 20, 2003, 2003 UST LEXIS 32. An earlier agreement between the United States and Haiti, to similar effect, was terminated by Jean Bertrand Aristide during his first presidency. See Exchange of Notes, United States-Haiti, Sept. 23, 1981, 33 UST 3559, 1981 UST LEXIS 40.

²⁹ See Associated Press, *Deal Lets U.S. Search Ships*, N.Y. TIMES, Feb. 11, 2004, at A4.

³⁰ Apparently because of concerns expressed by some European governments, the agreement does not extend to bareboat chartered vessels registered in the United States or Liberia by the owner but also registered in another state by the charterer. Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, Feb. 11, 2004, Art. 3, available at <<http://www.state.gov/t/np/trty/32403.htm>>. Any seized cargo is to be disposed of by the flag state in accordance with its national laws, but may be transferred to the other party in a manner that reflects the latter's "contribution . . . to facilitating or effecting the forfeiture of such assets or proceeds." *Id.*, Art. 12.

³¹ Amendment to the Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, May 12, 2004, available at <<http://www.state.gov/t/np/trty/32858.htm>>.

³² Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 7. See also Legal Committee of the International Maritime Organization, 87th session: 13 to 17 October 2003, summary of work available at <<http://www.imo.org/home.asp>>; PROLIFERATION SECURITY INITIATIVE, CHAIRMAN'S STATEMENT AT THE FIFTH MEETING, *supra* note 18.

³³ Michael Richardson, *It's Full Steam Ahead in Hunt for Terror Arms Shipments*, STRAITS TIMES (Sing.), Oct. 25, 2003, available at LEXIS, News Library, Individual Publications file. A similar approach is already used in some bilateral treaties directed at drug smuggling. See discussion, *infra* pp. 538–40.

³⁴ See discussion, *supra* p. 529.

by the U.S. Senate for its advice and consent to accession.³⁵ However, PSI member states have given no indication of moving in this particular direction.

The problem with all the treaty-based approaches is that the states most likely to traffic in WMD and associated technologies are unlikely to accord stop-and-search powers to other states. Ships flagged by nonconsenting states may be searched when in foreign harbors if reasonably suspected to be carrying armaments that have not been declared.³⁶ But modern vessels are able to circumnavigate the globe without stopping for fuel and provisions. Once port states begin asserting their right to search for and seize undeclared missiles and weapons components—as is envisaged under PSI—suspect vessels could simply avoid entering a port en route.

The most effective way to address the problem of nonconsenting states would be through the UN Security Council. Any country whose shipments of weapons were deemed by the Council to pose a threat to international peace and security could be made the subject of a Chapter VII resolution granting the necessary powers to other states.³⁷ On several previous occasions, the Council has categorized the proliferation of missiles and WMD as a threat to international peace and security. For example, in Resolution 687 of 1991, it stated that WMD posed a threat to “peace and security” in the Middle East and imposed a stringent disarmament regime on Iraq.³⁸ In Resolution 1172 of 1998, it condemned nuclear tests conducted by India and Pakistan and affirmed “that the proliferation of all weapons of mass destruction constitutes a threat to international peace and security.”³⁹ And in Resolution 1373 of 2001, in the aftermath of the terrorist attacks on New York and Washington, the Council noted “with concern” the close connection between international terrorism and, *inter alia*, the “illegal movement of nuclear, chemical, biological and other potentially deadly materials”; it also categorized this connection as a “threat to international security.”⁴⁰

The adoption of a Chapter VII resolution that authorized high seas interdictions would not be legally contentious, but it would depend on securing the support of nine of the fifteen Security Council members, including the votes, or at least the abstentions, of all five permanent members.⁴¹ At the moment, it is unclear whether the support or acquiescence of France, Russia, and China can be assured. Although France and Russia are participating in PSI, their relations with the Bush administration were strained by the decision to go to war in Iraq without express Security Council authorization.⁴² And though Chinese relations with North Korea have recently cooled, China has traditionally supported Pyongyang; it currently favors using economic and diplomatic pressure rather than steps that could provoke a military confrontation.⁴³ But even if it were possible to obtain a Security Council resolution specifically authorizing the interdiction of North Korean weapons shipments, the Bush administration might

³⁵ See Former Legal Advisers' Letter on Accession to the Law of the Sea Convention, 98 AJIL 307 (2004), and hearings cited at *id.*, n.1.

³⁶ On port state rights, see R. R. CHURCHILL & A. V. LOWE, *THE LAW OF THE SEA* 65–69 (3d ed. 1999) (“By entering foreign ports and other internal waters, ships put themselves within the territorial jurisdiction of the coastal State. Accordingly, that State is entitled to enforce its laws against the ship and those on board, subject to the normal rules concerning sovereign and diplomatic immunities, which arise chiefly in the case of warships.”) See also Ted L. McDorman, *Regional Port State Control Agreements: Some Issues of International Law*, 5 OCEAN & COASTAL L.J. 207 (2000); Doris König, *The Enforcement of the International Law of the Sea by Coastal and Port States*, 62 ZEITSCHRIFT FÜR AUßLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 (2002).

³⁷ See generally Jochen Abr. Frowein & Nico Krisch, *Introduction to Chapter VII*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 701–16 (Bruno Simma et al. eds., 2d ed. 2002).

³⁸ SC Res. 687, UN Doc. S/RES/687 (1991).

³⁹ SC Res. 1172, UN Doc. S/RES/1172 (1998).

⁴⁰ SC Res. 1373, para. 4, UN Doc. S/RES/1373 (2001).

⁴¹ See UN CHARTER Art. 27, para. 3.

⁴² See Doyle McManus, *U.S. Finds It's Lonely at the Top*, L.A. TIMES, Apr. 13, 2003, at 1; Elaine Sciolino, *A Nation at War: Estranged Allies; Europe Assesses Damage to Western Relationships and Takes Steps to Rebuild*, N.Y. TIMES, Apr. 2, 2003, at B12.

⁴³ See Evan S. Medeiros & M. Taylor Fravel, *China's New Diplomacy*, FOREIGN AFF., Nov./Dec. 2003, at 22.

prefer to avoid depending on a situation-specific Council resolution, since such a resolution would probably not authorize similar future actions against other states. A parallel may be seen in the decision not to seek express authorization for the 2001 intervention in Afghanistan. The right of self-defense was invoked instead, a move that helped to secure widespread agreement that the right of self-defense includes responsive action against state sponsors of terrorism, not just in Afghanistan.⁴⁴

In his speech to the UN General Assembly on September 23, 2003, President Bush requested that the Security Council adopt a new antiproliferation resolution that would "call on all members of the U.N. to criminalize the proliferation of weapons . . . of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders."⁴⁵ A draft resolution to this effect, introduced on March 24, 2004, by the United States on behalf of all the permanent members, was adopted as Resolution 1540 on April 28, 2004.⁴⁶ It invokes Chapter VII and requires all states to "develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law."⁴⁷ But it merely "calls upon all States," again in accordance with national and international law, "to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials."⁴⁸ The recommendatory nature of the latter provision indicates, together with the references to international law, an absence of any authorization to exceed the existing rules.

III. CUSTOMARY INTERNATIONAL LAW

In certain circumstances, customary international law might already allow for the high seas interdiction of suspected WMD or missile-laden vessels flagged by nonconsenting states. These circumstances could arise when the vessel posed an imminent threat, either to the interdicting state or to a third state that requested the interdiction. It is widely considered that the customary international law right of individual or collective self-defense, as referred to in Article 51 of the UN Charter, extends to preemptive action if there is a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation."⁴⁹ Indeed, the *Caroline* incident that gave rise to these criteria involved action taken to prevent weapons shipments, albeit across the Niagara River and not on the high seas.⁵⁰ If a North Korean flag merchant vessel were thirteen nautical miles from Los Angeles with what intelligence indicated was a nuclear weapon on board, few would contest the right of the United States to stop, search, and, if necessary, seize the vessel.

The law is less clear with respect to the high seas interdiction of weapons in less immediately threatening circumstances. Apart from the absence of any such right among the interdiction rights codified in Article 110 of the Law of the Sea Convention,⁵¹ the state practice on this specific issue is hardly conclusive. For example, in 1873, the *Virginian*, a U.S.-flag vessel, was seized on the high seas by the Spanish navy while carrying weapons, along with British and

⁴⁴ See Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT'L & COMP. L.Q. 401 (2002), reprinted in 16 INT'L REL. 155 (2002).

⁴⁵ President George W. Bush, Address to the United Nations General Assembly (Sept. 23, 2003), available at <<http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html>>. On February 11, 2004, President Bush renewed his call for prompt passage of such a resolution. See Remarks by the President on Weapons of Mass Destruction Proliferation, *supra* note 17.

⁴⁶ SC Res. 1540, UN Doc. S/RES/1540 (2004).

⁴⁷ *Id.*, para. 3(c).

⁴⁸ *Id.*, para. 10.

⁴⁹ R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AJIL 82, 89, 91-92 (1938).

⁵⁰ *Id.* at 82-84.

⁵¹ See discussion at note 8 *supra*.

U.S. nationals, to Cuba in support of an insurrection against Spain. Spain claimed self-defense: the claim was accepted by Britain but rejected by the United States.⁵²

During the late 1950s and early 1960s, France stopped and searched thousands of ships suspected of carrying weapons to Algeria during the uprising against French rule.⁵³ Its actions were strongly opposed by many of the states whose ships were affected.⁵⁴ Robin Churchill and Vaughan Lowe suggest that a contributing factor to the opposition was “the emergence . . . of rules limiting the use of force generally, and notably article 51 of the UN Charter, which arguably limits the right of self-defence to cases of armed attack.”⁵⁵ Although the colonial context may also have affected the international reaction, the evidence of state practice and *opinio juris* generated by opposition to the French policy would still seem to militate against the existence of any extended right of self-defense against weapons shipments on the high seas.⁵⁶

This conclusion is supported by British practice during the 1982 Falklands war, when London expressed the view that the right of self-defense did *not* extend to the interception of a French vessel carrying weapons to Argentina.⁵⁷ However, since Britain and Argentina were in a state of armed conflict, the widely accepted right of belligerent visit and search was probably available instead.⁵⁸

During the 1962 Cuban missile crisis, the United States asserted a right to stop and search vessels bound for that island nation to determine if they were carrying “offensive military equipment.” But it justified this action on the basis of Chapter VIII of the UN Charter, as regional peacekeeping,⁵⁹ though this fact has not prevented at least two academics from subsequently regarding the action as a precedent for preemptive self-defense.⁶⁰

Finally, there is some Israeli practice concerning high seas interdiction of weapon-laden vessels, most notably the January 2002 seizure of the *Karin-A*, an Iraqi-flagged ship in the Red Sea.⁶¹ Some fifty tons of mostly Iranian-made weaponry were found on board, including Katyusha rockets, antitank, and anti-aircraft missiles. Israel claimed that the weapons were destined for the Palestinian Authority and that it was acting in self-defense against an imminent threat;

⁵² CHURCHILL & LOWE, *supra* note 36, at 217. The dispute was eventually settled. Agreement to Resolve Claims in the Case of The Steamer “Virginius,” Feb. 27, 1875, U.S.-Spain, *reprinted in* 2 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1664-65 (William M. Malloy ed., 1910).

⁵³ D. Momaz, *La Haute Mer*, in TRAITÉ DU NOUVEAU DROIT DE LA MER 337, 368 (René-Jean Dupuy & Daniel Vignes eds., 1985).

⁵⁴ Robert C. F. Reuland, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 VAND. J. TRANSNAT’L L. 1161, 1218-19 (1989).

⁵⁵ CHURCHILL & LOWE, *supra* note 36, at 217.

⁵⁶ For a rule of customary international law to develop or change, a large majority of states must express their consent, either expressly or tacitly, through their behavior, which constitutes state practice as well as, potentially and crucially, evidence of their views as to the existence or desirability of legal obligation, i.e., *opinio juris*. See generally North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), 1969 ICJ REP. 3, 41, para. 71, (Feb. 20); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1 (1974-75); G. M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY (1993).

⁵⁷ See CHURCHILL & LOWE, *supra* note 36, at 217; Geoffrey Marston (ed.), *United Kingdom Materials on International Law 1982*, 53 BRIT. Y. B. INT’L L. 337, 469 (1982).

⁵⁸ See GEORGE P. POLITAKIS, MODERN ASPECTS OF THE LAWS OF NAVAL WARFARE AND MARITIME NEUTRALITY 529-75 (1998); SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, 215-16 (Louise Doswald-Beck ed., 1995); John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F.L. REV. 119, 138-47 (1997).

⁵⁹ See Abram Chayes, *Law and the Quarantine of Cuba*, FOREIGN AFF., Apr. 1963, at 550, 554; Richard N. Gardner, *Neither Bush nor the “Jurisprudes,”* 97 AJIL 585, 587 (2003). Both Chayes and Gardner were involved in the development of the U.S. position—Chayes as State Department legal adviser, Gardner as deputy assistant secretary of state for international organization affairs.

⁶⁰ See Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AJIL 576, 584-85 (2003); John Yoo, *International Law and the War in Iraq*, 97 AJIL 563, 571-73 (2003).

⁶¹ See David Horowitz, *Israel Says 50 Tons of Seized Arms Were Meant for Palestinians*, IRISH TIMES, Jan. 5, 2002, at 13; Eric Silver, *Israel Claims Seizure of Palestinian Arms Shipment*, INDEPENDENT, Jan. 5, 2002, at 14. In May 2003, an Egyptian-flagged vessel was seized in the Mediterranean with rocket fuses and bomb-making components on board. See Margot Dudkevitch et al., *Navy Seizes Hizbullah Arms Boat to PA*, JERUSALEM POST, May 23, 2003, at 1A.

Prime Minister Ariel Sharon described the vessel as a “ticking bomb.”⁶² The Authority, however, denied any involvement. Most importantly, there was little in the way of international comment. When asked whether the seizure was a breach of international law, U.S. Department of State spokesman Richard Boucher replied: “It was an Israeli operation. You can ask them questions about how it was conducted and what its basis was.”⁶³

The advent of PSI will soon introduce more state practice with respect to the issue of high seas interdiction via the various bilateral and multilateral treaty initiatives now under way. The widespread conclusion of treaties allowing for the search and seizure of suspected weapons-trafficking vessels could conceivably generate a new rule of customary international law in parallel to the treaty obligations.⁶⁴

The development of a new customary rule by way of treaty practice, however, may be made more difficult if the treaties in question are designed as exceptions to an established customary rule. Consider, for example, the decades-long debate over the effect of bilateral investment treaties on the customary international law concerning compensation for expropriation, or the refusal of the International Court of Justice in the North Sea Continental Shelf cases to discern *opinio juris* in a network of bilateral maritime delimitation agreements.⁶⁵ And if the established rule is particularly well rooted in state practice and *opinio juris*, this might also impede, or at least retard, any legal change.⁶⁶ The principle of exclusive flag state jurisdiction is one such rule, one that most states have traditionally sought to defend. As a result, those seeking new high seas interdiction powers have generally pursued the treaty avenue instead. The preference for the treaty approach to interdiction is apparent in many situations, of which the following are examples.

Banning the Transatlantic Slave Trade

During the nineteenth century, the United Kingdom was successful in developing rights of high seas interdiction (or, as it was then termed, “visitation”) as part of a larger effort to ban the transatlantic trade in slaves. However, this law-making success only proved possible through the negotiation of a number of bilateral treaties, which in turn made possible the negotiation of multilateral agreements. It did not, at least during the first two-thirds of the nineteenth century, result in the development of new customary international law.

During the eighteenth century, the British government regarded the slave trade as a legitimate business endeavor, and many British slave traders and plantation owners became wealthy.⁶⁷ But when the United States achieved independence in 1776, the “triangular trade” of molasses from the West Indies, rum from the North American colonies, and slaves from Africa ceased, and participation in the slave trade no longer benefited Britain’s economic interests.⁶⁸ In 1802, Napoleon reintroduced slavery in France—the practice having previously been abolished by the revolutionary government—and soon Britain’s former American colonies began a mutually

⁶² Address by Prime Minister Ariel Sharon Following the Seizing of the Ship *Karina A*, Eilat, Jan. 6, 2002, available at <<http://www.embassyofisrael.org/articles/2002/January/2002010706.html>>.

⁶³ Dep’t of State, Daily Press Briefing, Jan. 4, 2002, available at <<http://www.state.gov/r/pa/prs/dpb/2002/7046.htm>>.

⁶⁴ As the International Court of Justice said in the *North Sea Continental Shelf Cases*:

There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

North Sea Continental Shelf Cases, *supra* note 56, especially para. 77.

⁶⁵ See C. F. Amerasinghe, *Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice*, 41 INT’L. & COMP. L.Q. 22, 30 (1992); Davis Robinson, *Expropriation in the Restatement (Revised)*, 78 AJIL 176, 177–78 (1984); Oscar Schachter, *Compensation for Expropriation*, 78 AJIL 121, 126–27 (1984); *North Sea Continental Shelf Cases*, *supra* note 56, especially paras. 75–78.

⁶⁶ See MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES*, 109–26 (1999).

⁶⁷ WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 555–56 (Michael Byers, trans. & reviser, 2000).

⁶⁸ *Id.*

profitable slave trade with the French.⁶⁹ As Lord Greenville declared to the House of Lords on May 16, 1806: "With the continuation of the slave trade we only facilitate the competition of enemy colonies."⁷⁰

These changing economic interests coincided with the rise of an abolitionist movement in Britain. Led by Thomas Clarkson and William Wilberforce, it was based on humanitarian, rather than economic, concerns.⁷¹ The changing economic and moral landscape proved a potent combination: in 1810 the British government launched an international campaign to outlaw the transatlantic slave trade.⁷² This campaign involved five distinct phases: (1) bilateral treaties directed at promoting the eventual abolition of the trade; (2) a failed attempt to negotiate a multilateral treaty providing a right of visitation; (3) bilateral visitation treaties; (4) a successful attempt to negotiate a multilateral treaty; and (5) a failed attempt to assert a putative new right of customary international law against a nonconsenting state.

The first step in the campaign was the conclusion, from 1810–1814, of bilateral, slave trade–related treaties with Portugal, Sweden, Denmark, Spain, the Netherlands, and the United States.⁷³ But while these treaties aimed at the eventual abolition of the trade, they provided for no enforcement power.

Britain then switched to a multilateral track. The nonbinding Vienna Declaration of 1815 promoted the abolition of the slave trade through the adoption of national legislation.⁷⁴ As a result, Louis XVII declared himself ready to abolish "at once" the slave trade under the French flag.⁷⁵ And in the second Peace Treaty of Paris, also in 1815, the Great Powers declared themselves ready to abolish "completely and definitively a trade which is as odious as it is condemned by the laws of religion and nature."⁷⁶ But these statements remained hortatory. When, in 1818, Britain proposed to give them teeth through a multilateral treaty that would provide for "a system of maritime police against the contraband slave trade,"⁷⁷ the other European countries balked at the prospect, perceiving an ulterior motive of extending British authority to "all the world's oceans."⁷⁸ The 1822 Congress of Verona, instead of concluding with a binding multilateral treaty, produced nothing but an empty declaration.⁷⁹

Meanwhile, Britain had already returned to the bilateral track. The Anglo-Portuguese Treaty of 1817 was the "first great international treaty of the Modern Age against the African slave trade."⁸⁰ Through it, Britain and Portugal agreed to abolish all slave trading north of the Equator, and accorded each other a carefully limited reciprocal right of visitation with respect to any of their merchant ships suspected of carrying slaves.⁸¹ The concept of a right to stop

⁶⁹ *Id.* at 557.

⁷⁰ *Id.*

⁷¹ See THOMAS CLARKSON, *THE HISTORY OF THE RISE, PROGRESS, AND ACCOMPLISHMENT OF THE ABOLITION OF THE AFRICAN SLAVE TRADE BY THE BRITISH PARLIAMENT* (1808).

⁷² GREWE, *supra* note 67, at 557.

⁷³ *Id.* at 554. The need for any change in the law to be effected by way of treaty was confirmed by Sir William Scott (Lord Stowell) of the High Court of Admiralty in the *Louis Case* of 1817:

No authority can be found . . . which gives any right of visitation or interruption over the vessels and navigation of other states, on the high seas, except what the right of war gives to belligerents against neutrals . . . If this right be imported into a state of peace, it must be done by convention.

CHRISTOPHER LLOYD, *THE NAVY AND THE SLAVE TRADE: THE SUPPRESSION OF THE AFRICAN SLAVE TRADE IN THE NINETEENTH CENTURY* 44 (1949).

⁷⁴ GREWE, *supra* note 67, at 558.

⁷⁵ *Id.*

⁷⁶ F. von Martitz, *Das internationale System zur Unterdrückung des afrikanischen Sklavenhandels in seinem heutigen Bestand*, 1 ARCHIV DES ÖFFENTLICHEN RECHTS 16, 54 ff. (1885), cited in GREWE, *supra* note 67, at 558, n.14.

⁷⁷ G. F. VON MARTENS, 3 NOUVEAU RECUEIL DE TRAITÉS ETC., 93 (1806–39), cited in GREWE, *supra* note 67, at 558, n.12.

⁷⁸ GREWE, *supra* note 67, at 560.

⁷⁹ *Id.*

⁸⁰ Martitz, *supra* note 76, cited in GREWE, *supra* note 67, at 558, n. 13.

⁸¹ GREWE, *supra* note 67, at 560.

and search was drawn from the law of neutrality, as it had developed in the context of naval warfare with respect to ships flagged by nonbelligerent states.⁸² Similar treaties were soon concluded with Spain, the Netherlands, Sweden-Norway, and many Latin American countries.⁸³ Finally, in 1831, France entered into a treaty with Britain conceding a reciprocal right of visitation, again under specific conditions.⁸⁴

Following the successful negotiation of these bilateral visitation agreements, Britain again promoted a multinational treaty with effective enforcement powers. This it achieved in 1841, when Britain, France, Russia, Prussia, and Austria signed the Quintuple Treaty for the Suppression of the African Slave Trade, Article 1 of which declared the slave trade to be a crime of piracy.⁸⁵ However, while this terminology was couched within an essentially contractual agreement between five states, its adoption was also aimed at extending the right of visitation to vessels from nonconsenting states, since by this stage it was widely agreed, including by the United States in the Jay Treaty of 1794, that pirates were subject to universal jurisdiction under customary international law.⁸⁶

However, the United States proved to be the major obstacle to the British effort to establish a generally applicable, nontreaty right of visitation with respect to the slave trade.⁸⁷ Following the adoption of the Quintuple Treaty, slave traders began to hoist the U.S. flag when confronted with British naval vessels.⁸⁸ In response, the British began to assert the right to an "enquête du pavillon" whereby they would check the ship's papers but not examine its cargo—that is, unless the papers did not match the ship's flag.⁸⁹ A protracted diplomatic dispute, known as the "Visitation Crisis," ensued between the two countries until the British government backed down in 1858, declaring in the House of Commons "that by international law we have no right of search, no right of visitation whatever, in time of peace."⁹⁰ Shortly thereafter, however, the political fractures and international exigencies of the American Civil War led to the concession by the United States in the 1862 Washington Treaty, of a mutual right of interdiction.⁹¹

The history of the British attempt to ban the transatlantic slave trade demonstrates how very difficult it is to achieve a customary international law right of interdiction on the high seas. But such rights are often achievable by way of treaties, where the assertion of jurisdiction, having been explicitly consented to in advance, is uncontroversial as between the parties. A similar pattern is discernable in Canada's mid-1990s attempt to secure a right of interdiction with respect to certain fishing vessels on the high seas.

Preserving Straddling Fish Stocks

In the 1982 Law of the Sea Convention, a number of contested unilateral claims to jurisdiction—for example, over archipelagic waters, the twelve-mile territorial sea, 200-mile fishing and resource-extraction zones, and the Canadian Arctic Waters Pollution Prevention Act—were accommodated through the negotiation of a widely ratified multilateral treaty.⁹² Subsequent

⁸² See H. G. SOULSBY, *THE RIGHT OF SEARCH AND THE SLAVE TRADE IN ANGLO-AMERICAN RELATIONS 1814-1862* (1933); citations *supra* note 58.

⁸³ GREWE, *supra* note 67, at 561.

⁸⁴ *Id.*

⁸⁵ *Id.* at 562.

⁸⁶ See *id.* at 561; Treaty of Amity, Commerce, and Navigation (Jay Treaty) Art. 20, Nov. 19, 1794, U.K.-U.S., 8 Stat. 116.

⁸⁷ See SOULSBY, *supra* note 82.

⁸⁸ GREWE, *supra* note 67, at 564-65.

⁸⁹ *Id.* at 565. On the right of "enquête du pavillon" today, see *supra* note 5.

⁹⁰ *Id.* at 566. On the "Visitation Crisis," see JOHN BASSETT MOORE, 2 *DIGEST OF INTERNATIONAL LAW* 914-51 (1906); 3 FRANCIS WHARTON, *DIGEST OF INTERNATIONAL LAW* 122-71 (2d ed., 1887).

⁹¹ See LLOYD, *supra* note 73, at 174-75. Almost one century later, a right to visitation was included in Articles 13 and 22(1)(b) of the 1958 Geneva Convention on the High Seas, *supra* note 9, the preamble to which states that it is a codification of customary international law.

⁹² See LOS Convention, *supra* note 5, Arts. 3, 19-24, 37-54, 234, 236.

developments have given rise to similar claims that, in the end, were resolved through other treaty mechanisms.

In the mid-1990s, Canada became concerned about a precipitous decline in fish stocks on the Grand Banks of the northwestern Atlantic. The decline was exacerbated by foreign fishing vessels operating beyond the 200-mile exclusive economic zone. In response, Canada asserted a right to interdict vessels on the high seas, if those vessels were suspected of violating conservation measures agreed upon among the member states of the North Atlantic Fisheries Organization (NAFO).⁹³ The claim failed as an attempt to develop customary international law, but was successful in applying pressure during multilateral treaty negotiations that, in the end, provided Canada with much of what it sought through unilateral action.⁹⁴

Canada's initiative began with the adoption of legislation, entitled "An Act to Amend the Coastal Fisheries Protection Act," in May 1994.⁹⁵ The legislation empowered Canadian fisheries officers to arrest foreign vessels in international waters off Canada's east coast if they believed those vessels to be acting contrary to measures agreed upon by NAFO member states, or established by Canada.⁹⁶ It was introduced in what Canada claimed was an attempt to create a rule of customary international law allowing coastal states to engage in such extraterritorial enforcement measures.⁹⁷

The legislation was strongly protested by other states. The French Foreign Minister condemned it in the French National Assembly and European Union (EU) fisheries ministers agreed to inform Canada that the act was illegal under international law.⁹⁸

In August 1994, the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks began in New York. The head of the U.S. delegation and the chair of the conference both decried Canada's unilateral actions, while EU representatives said that they were "extremely worried."⁹⁹ Canada responded by pushing hard for a multilateral treaty that would extend a coastal state's right to manage fish stocks to the outer edge of the continental shelf.¹⁰⁰ On the opening day of the conference, Canada and Norway announced that they were negotiating a bilateral treaty that would allow each state to police the other state's fishing vessels outside the 200-mile zone; they expressed hope that this would serve as a model for a multilateral agreement regulating high seas fishing.¹⁰¹

On March 9, 1995, Canada stopped, searched, and arrested a Spanish trawler 245 miles off the Canadian coast and towed it to St. John's, Newfoundland.¹⁰² Emma Bonino, the EU fisheries commissioner, called the encounter "an act of organised piracy,"¹⁰³ and the Spanish government filed proceedings against Canada in the International Court of Justice.¹⁰⁴

⁹³ NAFO is the international agency that oversees voluntary fishing regulations for seventeen countries fishing outside Canada's 200-nautical-mile exclusive economic zone. See generally <<http://www.nafo.ca>>.

⁹⁴ See generally Peter C. G. Davies & Catherine Redgwell, *The International Legal Regulation of Straddling Fish Stocks*, 67 BRIT. Y.B. INT'L L. 199 (1996).

⁹⁵ Canada: Coastal Fisheries Protection Act as Amended in 1994 [received Royal Assent, May 12, 1994], reprinted in 33 ILM 1383 (1994).

⁹⁶ *Id.*

⁹⁷ *Tobin Moves on Fish "Pirates,"* GLOBE & MAIL (Toronto), May 11, 1994, at A1.

⁹⁸ *EU Protests Fisheries Law,* FIN. POST (Toronto), June 11, 1994, at 16; *Putting Pirate Fishing Boats on the Spot,* GLOBE & MAIL (Toronto), June 2, 1994, at A8.

⁹⁹ *Norway Sides with Canada on Fishing Deal,* CALGARY HERALD, Aug. 16, 1994, at A7.

¹⁰⁰ *Showdown News on High-Seas Fishing,* FIN. POST (Toronto), Aug. 13, 1994, at 8; *Tobin to Speak at UN on Overfishing,* GLOBE & MAIL (Toronto), Aug. 15, 1994, at A3.

¹⁰¹ *Norway Sides with Canada on Fishing Deal,* supra note 99.

¹⁰² John Carvel, *Canada Arrests Spanish Captain as Fish War with Europe Looms,* GUARDIAN (London), Mar. 10, 1995, at 13; Wolfgang Munchau, *EU Brands Seizure of Spanish Trawler an Act of Piracy,* TIMES (London), Mar. 11, 1995, at 15, available at LEXIS, News Library, Individual Publications file.

¹⁰³ Munchau, supra note 102; Edison Stewart, *Canadians Seize Spanish Trawler,* TORONTO STAR, Mar. 10, 1995, at A1.

¹⁰⁴ The Court eventually determined that it could not hear the case, as the result of Canada having modified its acceptance of compulsory jurisdiction shortly before the adoption of the 1994 legislation. See Fisheries Jurisdiction (Sp. v. Can.), Dec. 4, 1998, Gen. List No. 96, <<http://212.153.43.18/icjwww/idoctet/icc/iccframe.htm>>.

As state practice and *opinio juris*, the widespread opposition to Canada's actions effectively precluded the development of new customary international law. However, Canada's principal goal of providing legal protection for the fish stocks was soon achieved. On August 4, 1995, the UN General Assembly adopted the "Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks."¹⁰⁵ This multilateral treaty, which came into force in December 2001, allows the parties to inspect each others vessels on the high seas, secure evidence, and, if a flag state fails to respond or take action once being notified of an apparent violation of regional fisheries measures, bring the offending vessel to port. At the same time, Canada and the EU entered into a bilateral treaty concerning satellite tracking and the placing of fisheries inspectors on each other's vessels.¹⁰⁶ Since the adoption of these treaties, seizures of fishing vessels have increased dramatically worldwide; Australia alone apprehended more than seventy-nine vessels in the first eight months of 2003.¹⁰⁷ Some, but not all of these seizures occurred on the high seas, pursuant to the treaty law that resulted, at least in part, from Canada's unilateral actions.

And so here again, an effort to develop a customary international law right of high seas interdiction proved unsuccessful, and the problem was instead dealt with by way of treaty. A related pattern of legal development is evident with respect to the maritime aspects of the United States' "war on drugs."

Interdiction of Drug Smugglers

The United States has felt threatened by maritime drug trafficking since the 1970s, when demand for marijuana exceeded the capacity of Mexican suppliers and dealers turned to Central and South America for their supplies.¹⁰⁸ Marijuana is a relatively bulky drug, which meant that most of the smuggling took place by sea. The United States' lengthy coastline made it porous to the small, fast boats used to bring the drugs ashore. The U.S. Coast Guard consequently decided to focus its attention on the larger and slower "mother ships" and to expand the interdiction effort to areas far from the U.S. coast and often closer to foreign coasts. Obtaining the legal capacity to engage in high seas interdictions consequently became a key element in the U.S. antismuggling campaign.

Rather than seeking to modify the requirement of flag-state consent, the United States chose to uphold it. Initially, it sought consent on a case-by-case basis.¹⁰⁹ But as the drug smugglers became more sophisticated, and their cargos grew to include cocaine and heroin, the United States negotiated and concluded a series of twenty-three bilateral treaties with Caribbean and Central American states.¹¹⁰ Some of these treaties are referred to as "shiprider" agreements,

¹⁰⁵ *Supra* note 27. See generally R. P. Barston, *United Nations Conference on Straddling and Highly Migratory Fish Stocks*, 19 MARINE POLY 159 (1995). To date, there are fifty-one parties to the Agreement, including Canada, the European Community, and the United States. See UNITED NATIONS, OVERVIEW—CONVENTION & RELATED AGREEMENTS, available at <http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm>.

¹⁰⁶ Canada-European Community: Agreed Minute on the Conservation and Management of Fish Stocks (Apr. 20, 1995), reprinted in 34 ILM 1260 (1995).

¹⁰⁷ Alison Rehn, *Scales of Justice*, COURIER MAIL (Austl.), Aug. 23, 2003, Features, at 33.

¹⁰⁸ See CHARLES M. FUSS JR., SEA OF GRASS: THE MARITIME DRUG WAR 1970–1990, 8 (1996).

¹⁰⁹ See William C. Gilmore, *Narcotics Interdiction at Sea: UK-US Cooperation*, 13 MARINE POLY 218, 220–22 (1989).

¹¹⁰ See Rachel Carty, *Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas*, 23 TUL. MAR. L.J. 123 (1998); Joseph E. Kraneck, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is this the World of the Future?* 31 U. MIAMI INTER-AM. L. REV. 121 (2000). For the July 10, 2000 update of the table of agreements annexed to Kraneck's article, see <<http://www.ciponline.org/facts/mar.htm>>. Additional treaties have subsequently entered into force with Haiti (Agreement Between the United States of America and the Republic of Haiti Concerning Cooperation to Suppress Illicit Maritime Drug Traffic, Oct. 17, 1997, 1997 UST LEXIS 128), Honduras (Agreement Between the Government of the United States of America and the Government of the Republic of Honduras Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotic Drugs and Psychotropic Substances, Mar. 29, 2000, 2000 UST LEXIS 159), Nicaragua (Agreement Between the Government of the

whereby the Caribbean or Central American state commits, when requested, to placing one of its own officials aboard a U.S. Coast Guard vessel. The official is thus pre-positioned to authorize, on an ad hoc basis, the interdiction of any vessel flagged by his state.¹¹¹ Shiprider agreements enable smaller countries to retain an element of control over the interdiction of vessels flagged by them, while in practical terms providing the United States with all the legal authority it needs.

Some of the bilateral treaties go further by granting consent to interdictions in advance. Although this advance consent does not require the presence of a flag state official on board, other conditions are often imposed. For example, under a 1981 treaty between the United Kingdom and the United States, the United Kingdom agrees not to object to the interdiction of British vessels, including those flagged by British dependencies, in a defined geographical zone that includes "the Gulf of Mexico, the Caribbean Sea, that portion of the Atlantic Ocean West of longitude 55 [degrees] West and South of latitude 30 [degrees] North and all other areas within 150 miles of the Atlantic coast of the United States."¹¹² But this advance consent is subject to the right of the British government to be fully informed of any interdiction and, if it chooses, to subsequently require the release of the vessel or any British national found on board.¹¹³

Finally, under some of the bilateral treaties, the United States is required to seek permission to interdict on a case-by-case basis. However, these treaties also stipulate that if the request is not responded to within a set, relatively short, period of time, the existence of consent may be presumed.¹¹⁴ This presumed consent is, of course, still based on express consent—as provided by treaty—and it still affords the smaller state means by which to exercise some element of control. It is this approach that has found its way into the recent U.S.-Liberia bilateral treaty on high seas weapons trafficking as well as the United States' proposed amendments to the Suppression of Unlawful Acts Convention.¹¹⁵

For present purposes, the key point is that, with respect to drug smuggling, the United States chose to work with, rather than against, the requirement of flag state consent when addressing a problem that necessitated an enhanced legal capacity to engage in high seas interdictions. There are several possible, related explanations for the focus on bilateral treaties in this instance rather than an effort to modify customary international law. One is that, in practical terms, the United States can achieve all that it needs by way of the treaties: if the vessels

United States of America and the Government of the Republic of Nicaragua Concerning Cooperation to Suppress Illicit Traffic by Sea and Air, June 1, 2001, 2001 USI LEXIS 63), and Guatemala (Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala concerning cooperation to suppress illicit traffic in narcotic drugs and psychotropic substances by sea and air, June 19, 2003), available at <<http://usembassy.state.gov/guatemala/wwwfusguatmaritimeagreement.pdf>>. Some other countries have concluded similar treaties as between themselves. See, e.g., Treaty Between Spain and Italy to Combat Illicit Drug Trafficking at Sea, Mar. 23, 1990, Spain-Italy, 1776 UNIS 229 (entered into force May 7, 1994); Vicenta Carreño Gualde, *Suppression of the Illicit Traffic in Narcotic Drugs and Psychotropic Substances on the High Seas: Spanish Case Law*, 4 SPANISH Y.B. INT'L L. 91 (1995-96). The conclusion of the various bilateral treaties was anticipated by Article 17 of the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 28 ILM 497, also available at <http://www.unodc.org/pdf/convention_1988_cn.pdf>, which, while affirming the requirement of flag state consent, encourages the conclusion of bilateral or regional treaties providing a right of stop, search and seizure to other states. See William C. Gilmore, *Drug Trafficking by Sea: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 15 MARINE POL'Y 183 (1991).

¹¹¹ The shiprider would also, importantly, be able to authorize the U.S. vessel to pursue any particular non-U.S. vessel into the territorial waters of his state, and to authorize the U.S. vessel to engage in "hot pursuit" of a suspect foreign-flagged vessel fleeing from those same waters.

¹¹² Great Britain and Northern Ireland: Narcotic Drugs: Interdiction of Vessels, Exchange of Notes concluded Nov. 13, 1981, 33 USI 4224, 1981 USI LEXIS 91. See also John Siddle, *Anglo-American Cooperation in the Suppression of Drug Smuggling*, 31 INT'L & COMP. L. Q. 726 (1982); Gilmore, *Narcotics Interdiction at Sea: UK-US Cooperation*, *supra* note 109.

¹¹³ *Id.*

¹¹⁴ For example, the treaty with Nicaragua, *supra* note 110, states that authorization to board and search "will be understood to have been granted if no reply to the request for authorization has been made within two hours."

¹¹⁵ See discussion at notes 29-33 *supra*.

used to smuggle drugs to the United States are flagged at all, they are most likely flagged by Caribbean and Central American states; and these states, being heavily dependent on the United States, were easily persuaded to conclude bilateral treaties. Another explanation is that the United States values the requirement of flag state consent as it applies to and protects its merchant vessels (whether flagged at home or abroad) as well as foreign vessels legitimately carrying goods to or from U.S. territory, and in this instance realized that a reciprocally available customary right of interdiction would not be in its interest, particularly when bilateral treaties could achieve the same end. A third explanation is that the United States realized that other states would not readily surrender the requirement of flag state consent on an irrevocable basis, and any effort to develop a right to interdict suspected drug smugglers in customary international law would therefore fail. In this context, it is noteworthy that the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 1995 Council of Europe Agreement on Illicit Traffic by Sea both affirm the requirement of flag state consent for high seas interdictions of vessels suspected of drug smuggling;¹¹⁶ Article 110 of the Law of the Sea Convention does the same by implication, with the qualification—set out in Article 108—that all states “shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.”¹¹⁷ One of the possible advantages of a bilateral treaty is the fact that the consent on which it is based is not irrevocable in the same way as consent to a customary rule or a general rule in a law-making convention that may acquire the same status. Instead, it could conceivably be withdrawn, or the treaty could be considered to have lapsed, if the right were consistently abused by the other state.¹¹⁸

These three case studies confirm that the requirement of flag state consent is deeply valued by most states and, therefore, is highly resistant to change. A new customary international law right of interdiction is unlikely to develop simply as a result of the conclusion of numerous bilateral and multilateral treaties relating to the trafficking of missiles and WMD by sea. But this is not to say that a new customary right to interdict could not arise as the result of developments more broadly, including those outside the law of the sea.

IV. AN EXTENDED RIGHT OF PREEMPTIVE SELF-DEFENSE?

In most circumstances, foreign-flag vessels suspected of transporting missiles and WMD on the high seas will not constitute a threat that is “instant, overwhelming, leaving no choice of means, and no moment of deliberation.”¹¹⁹ However, the United States has recently sought, particularly through its September 2002 National Security Strategy,¹²⁰ to extend the general right of preemptive

¹¹⁶ U.N. Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 110, Art. 17 (“Illicit traffic by sea”); Council of Europe Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art. 6, Europ. T.S. No. 156 (“Basic rules on authorization”), also available at <<http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>>. On the former agreement, see Gilmore, *Drug Trafficking by Sea: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, *supra* note 110. On the latter, see William C. Gilmore, *Narcotics Interdiction at Sea: The 1995 Council of Europe Agreement*, 20 MARINE POL’Y 3 (1996).

¹¹⁷ See discussion at note 8 *supra*. Article 108 reads:

1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.

2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.

¹¹⁸ On withdrawal from treaties and the consequences of “material breach,” see 1969 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969), Arts. 56, 60, also available at <<http://untreaty.un.org>>.

¹¹⁹ See discussion *supra* p. 532.

¹²⁰ NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at <<http://www.whitehouse.gov/nsc/nss.pdf>>. See also *Threats and Responses; From the Document: A Stress on Disrupting Terrorism*, N.Y. TIMES, Sept. 20, 2002, at A14.

self-defense to more distant and uncertain challenges.¹²¹ Although this effort is not specific to the law of the sea, it is framed in the context of the combined threat from global terrorism and WMD. And to the degree that it proves successful, it will directly affect the extent to which states may engage in high seas interdictions of suspect vessels flagged by nonconsenting states.

John Bolton, the architect of PSI, asserted on several occasions during the early stages of the initiative that an extended right of preemptive self-defense was part and parcel of it. For example, during the PSI meeting in Brisbane in July 2003, he told *The Australian* that the United States had "a general right of self-defence if there was a serious belief that the North Korean vessels were carrying material for use in WMDs."¹²² Similarly, in a speech to the Federalist Society in November 2003, he said, with specific reference to high seas interdictions of vessels flagged by nonconsenting states:

Where there are gaps or ambiguities in our authorities, we may consider seeking additional sources for such authority, as circumstances dictate. What we do not believe, however, is that only the Security Council can grant the authority we need, and that may be the real source of the criticism we face.¹²³

The Bush doctrine of preemptive self-defense is controversial, not least because its principal proposal—the adaptation of "the concept of imminent threat to the capabilities and objectives of today's adversaries"—would introduce more ambiguity into the law, thus allowing power and influence to play a greater role in determining whether self-defense is available in particular situations.¹²⁴ And the doctrine has, generally speaking, not received the widespread support needed to change customary international law. A few regional powers, such as India, Israel, and Russia, responded favorably,¹²⁵ as did Australian Prime Minister John Howard, who went on to suggest that the UN Charter be amended to allow for a right of unilateral preemptive action.¹²⁶ However, Howard's comments sparked angry protests from other Southeast Asian states, protests that could themselves constitute state practice and provide evidence of *opinio juris*.¹²⁷ And Japan, while expressing support for a right of preemptive self-defense, was careful to confine its claim to the *Caroline* criteria.¹²⁸

As the Iraq crisis escalated, this at-best mixed reaction may have contributed to bringing the United States to the Security Council where, on November 8, 2002, it obtained Resolution 1441.¹²⁹ Although the resolution did not expressly authorize the use of force against Iraq,

¹²¹ See Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 171, 181–82 (2003).

¹²² Greg Sheridan, *US "Free" to Board N Korea Shipping*, AUSTRALIAN, July 9, 2003, at 1. See also Bradley Graham, *Gaps in Plan to Halt Arms Trade; Legal Authority for Intensified Interdiction Is Questioned*, WASH. POST, Aug. 3, 2003, at A23 ("In extreme situations, such as the sale by North Korea of a nuclear device, a strong argument can be made for declaring a clear and present danger, justifying action under the UN Charter's right of self-defense, U.S. officials said Indeed, U.S. officials have made clear that U.S. forces are prepared to undertake interdictions in international waters or elsewhere if they get a good lead."); Christopher Kremmer, *High Stakes on the High Seas in Korean Blockade*, SYDNEY MORNING HERALD, July 12, 2003, at 34 (quoting Bolton, "[i]t's not only legitimate, it's necessary self-defence.").

¹²³ John R. Bolton, "Legitimacy" in *International Affairs: The American Perspective in Theory and Operation*, Remarks to the Federalist Society, Washington, D.C., Nov. 13, 2003, available at <<http://www.state.gov/t/us/rm/26143pf.htm>>.

¹²⁴ NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, *supra* note 120, at 15. See Byers, *Preemptive Self-Defense*, *supra* note 121, at 181–2.

¹²⁵ See Sonni Efron & Carol J. Williams, *Plan Likely to Further Isolate U.S.; Policy: Some Critics Worry that Other Nations Will See a Rationale to also Strike Preemptively*, L.A. TIMES, Sept. 21, 2002, at 1 (discussing Russia's claim); Arieh O'Sullivan, *Pakistan Tests Missile Amid Fears of Israeli-Indian Strike*, JERUSALEM POST, Oct. 15, 2003, at 4 (discussing India and Israel's claims); Megan K. Stack & Henry Chu, *Syria Asserts Its Right to Self-Defense; It Might Strike Back if Israel Launches Another Attack, Damascus Says. The Threat Caps a Week of Escalating Rhetoric Between the Nations*, L.A. TIMES, Oct. 12, 2003, at 3 (also discussing the Israeli claim to a right of preemption).

¹²⁶ See John Shaw, *Threats and Responses: Asia-Pacific; Startling His Neighbors, Australian Leader Favors First Strikes*, N.Y. TIMES, Dec. 2, 2002, at A11.

¹²⁷ See Virginia Marsh, *Canberra Statement on Terror Action Angers Neighbours*, FIN. TIMES, Dec. 3, 2002, at 10.

¹²⁸ Shane Green, *Japan Ready To Strike First If Threatened: PM*, SYDNEY MORNING HERALD, May 22, 2003, at 8.

¹²⁹ SC Res. 1441, Nov. 8, 2002, available at <<http://www.un.org/documents/scres.htm>>. See also Julia Preston, *Threats and Responses: United Nations; Security Council Votes, 15-0, For Tough Iraq Resolution; Bush Calls It a "Final Test"*, N.Y. TIMES, Nov. 9, 2003, at A1.

its terms provide some support for an argument that a previous authorization, accorded in Resolution 678 of 1990, was revived as a result of Iraq's "material breaches" of Resolution 687, the 1991 cease-fire resolution.¹³⁰ The Bush administration subsequently relied on both this argument and the preemptive self-defense claim to justify the war,¹³¹ while its two principal allies, Britain and Australia, relied solely on the Security Council resolutions.¹³² The advancement of two distinct arguments, with the latter receiving broader support, may have reduced any effect the preemption claim might otherwise have had on customary law.¹³³

More recently, widespread opposition to the Bush doctrine was evident in speeches at the opening of the fifty-eighth session of the UN General Assembly in September 2003. For instance, Hidipo Hamutenya, the Foreign Minister of Namibia, observed that "the central theme, that runs through nearly all the speeches at this Session, is the call for a return to multilateral dialogue, persuasion and collective action, as the only appropriate approach to resolving many conflicts facing the international community."¹³⁴ The claim that an extended right of preemptive self-defense has the widespread support needed to develop customary international law is difficult to make in light of this and other negative reactions. And yet the claim continues to be made, most recently in a television interview given by President Bush on February 7, 2004, where he went so far as to say: "I believe it is essential—that when we see a threat, we deal with those threats before they become imminent. It's too late if they become imminent. It's too late in this new kind of war."¹³⁵

Given its continued commitment to the doctrine, it might be considered surprising if the Bush administration did *not* seek to include an extended form of preemptive self-defense within PSI, as one of a series of legal mechanisms for curtailing the international traffic in missiles and WMD. Moreover, an extended right of preemption could provide an additional advantage not achievable by way of treaty, parallel customary international law, or even the existing authorities of port states: it would apply not only to merchant but also to military vessels, such as those North Korea might choose to employ to avoid the other mechanisms being put in place under PSI.¹³⁶

V. EXCEPTIONAL ILLEGALITY

It should not be assumed, however, that the United States is seeking to change customary international law in this area, even if it envisages a possible need to engage in high seas

¹³⁰ See Jane E. Stromseth, *Law and Force after Iraq: A Transitional Moment*, 97 AJIL 628, 629–31 (2003).

¹³¹ See President George W. Bush, Address to the Nation (Mar. 17, 2003), available at <<http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>>.

¹³² See Mark Davis & Alessandra Fabro, *PM Tables Advice that Action Is Legitimate*, AUSTRALIAN FIN. REV., Mar. 19, 2003, at 9; Frances Gibb, *Attorney-General Gives MPs Legal Basis for War*, TIMES (London), Mar. 18, 2003, at 2; Statement by the Attorney General, Lord Goldsmith, in Answer to a Parliamentary Question, 18 Mar. 2003, available at <<http://www.fco.gov.uk/>>.

¹³³ For a similar observation, see Georg Nolte, *The Limits of the Security Council's Powers and Its Functions in the International Legal System—Some Reflections*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 315, 325–26 (Michael Byers ed., 2000).

¹³⁴ Hidipo Hamutenya, Foreign Minister of Namibia, Address to the General Assembly (Sept. 30, 2003), available at <<http://www.un.org/webcast/ga/58/statements/namieng030930.htm>>. See also Godfrey Smith, Attorney General & Foreign Minister of Belize, Address to the General Assembly, (Sept. 30, 2003), available at <<http://www.un.org/webcast/ga/58/statements/belieng030930.htm>>.

¹³⁵ Interview with President George W. Bush on *Meet the Press with Tim Russert*, taped Feb. 7, 2004, broadcast Feb. 8, 2004, transcript available at <<http://msnbc.msn.com/id/4179618/>>. See also President George W. Bush, State of the Union Speech, Jan. 20, 2004, available at <<http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>> ("America will never seek a permission slip to defend the security of our country.")

¹³⁶ Warships (and other government-owned ships operated for noncommercial purposes) benefit from immunity under customary international law, as codified in Articles 32, 95, 96, & 110 of LOS Convention, *supra* note 5. This immunity does not protect against self-defense or other responses to violations of the international law on the use of force. See CHURCHILL & LOWE, *supra* note 36, at 99.

interdictions of vessels flagged by nonconsenting states. The various noncontroversial mechanisms involved in PSI, if rigorously advanced and applied, will render such situations highly exceptional. Moreover, the United States itself ascribes considerable importance to the requirement of flag state consent.¹³⁷ The combination of these two considerations raises the possibility that the United States, if and when it needs to act, may simply choose to violate the law rather than seek to modify it.

This, indeed, is one possible interpretation of the approach taken during the 1999 Kosovo intervention, where most of the intervening states were careful *not* to advance a legal justification for their action.¹³⁸ In the truly exceptional situation where there is a strongly felt compulsion to act, consent from the relevant sovereign state cannot be obtained, and the Security Council is not prepared to authorize action, states may choose to breach the rules without advancing strained and potentially destabilizing legal justifications. By doing so, they allow their action to be assessed subsequently, not in terms of the law, but in terms of its political and moral legitimacy, with a view to mitigating their responsibility rather than exculpating themselves.

If the United States interdicted a North Korean flag vessel on the high seas and seized its cargo *without* claiming the legal right to do so, it would be opening itself up to a requirement of reparation. However, as the International Law Commission made clear in its 2001 Articles on State Responsibility, any determination of reparations must take into account any contributory "wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."¹³⁹ In this era of global terrorism, there is an argument to be made that trafficking in missiles and WMD, even if not illegal, involves a degree of negligence on the part of the trafficking state. In any event, any compensation that might be due as a result of the interdiction would likely not deter the United States, provided that its concerns were well founded and its motives sincere.

In the absence of a legal claim by the United States, most states would likely remain silent, there being no need to protest an action for which no *opinio juris* exists. More cautious states might wish to express the view that the interdiction, while supportable on moral or political grounds, was inconsistent with international law and should remain so. This would help to ensure that the requirement of flag-state consent remained secure and that the exceptional violation did not, over time, somehow become regarded as the rule.

VI. CONCLUSION

The Proliferation Security Initiative is reflective of a shift in U.S. foreign policy toward a more flexible approach to collective action that eschews both ad hoc unilateralism and institutionalized multilateralism. What Department of State Director of Policy Planning Richard Haass has characterized as a "*à la carte* multilateralism" involves coalitions that will vary in size and composition depending on the issue at hand, with the only constant being that the coalitions are formed and led by the United States.¹⁴⁰ From Washington's perspective, this approach

¹³⁷ See discussion *supra* pp. 527–28.

¹³⁸ See Michael Byers & Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DIMENSIONS 177, 195–201 (J. L. Holzgrefe and Robert O. Keohane eds., 2003).

¹³⁹ See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission on the Work of its Fifty-third Session, Art. 39, available at <[http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(c\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(c).pdf)>.

¹⁴⁰ For an earlier articulation of this view, see RICHARD N. HAASS, *THE RELUCTANT SHERIFF: THE UNITED STATES AFTER THE COLD WAR* 88 (1997). See Thom Shanker, *White House Says the U.S. Is Not a Loner, Just Choosy*, N.Y. TIMES, July 31, 2001, at A1. See also Richard N. Haass, Remarks at the Kennan Institute 2003 Annual Dinner, Washington, D.C., May 22, 2003, available at <<http://www.state.gov/s/p/rem/2003/20910.htm>>; Richard N. Haass, Remarks to the Chicago Council on Foreign Relations, Chicago, June 26, 2002, available at <<http://www.state.gov/s/p/rem/11415.htm>>. For critiques, see IVO H. DAALDER & JAMES M. LINDSAY, *AMERICA UNBOUND: THE BUSH REVOLUTION IN FOREIGN POLICY* (2003); Joseph S. Nye Jr., *U.S. Power and Strategy After Iraq*, FOREIGN AFF., July/Aug. 2003, at 60.

would seem to offer several advantages: it largely avoids problems of institutional blockage, such as those that can occur within the UN Security Council; it allows for the limitation of new initiatives to small groups of like-minded states, with the group then being expanded once momentum has been achieved; and it enables the United States to focus its persuasive efforts on those most able and willing to assist with respect to any given matter.

Limiting the early stages of a law-making initiative to a core group of like-minded states is hardly a new strategy. For example, it was readily apparent in the mid-1990s attempt to develop a multilateral agreement on investment. Those negotiations were confined to the twenty-nine developed states of the Organization on Economic Cooperation and Development (OECD), with the express intent of creating a "free-standing" treaty to which non-OECD members could later accede on a negotiated case-by-case basis. Developed states, which already had high standards of investment protection, were thus excluding developing states from negotiations on a treaty that was intended ultimately to apply to them. And developing states would have had little option but eventually to sign on; had the negotiations been successful, accession to the agreement would likely have become a factor in the granting of foreign aid, the provision of emergency assistance by the International Monetary Fund, and the World Bank's public assessment of the creditworthiness of individual developing states.¹⁴¹ PSI seems likewise designed to develop momentum among a core group of like-minded developed states, with additional states being invited—first to cooperate, then to participate—but only after agreement on principles has been achieved.

However, keeping the early stages of an initiative within a core group of states might not overcome all hurdles. Bolton's early statements on preemptive self-defense are noteworthy in this context, in that they were not supported by other PSI states; indeed, *The Australian* claimed that its report of his comments in Brisbane led to a "rift" between the United States and the other countries, which believed that "a UN Security Council resolution or an international convention would be required to allow interception on the high seas."¹⁴² A contributing factor here may be the fact that both China and Russia have expressed concerns about, and questioned the legality of, this aspect of the initiative.¹⁴³ Although Russia has recently joined PSI, China has made considerable efforts to manage the North Korean situation by diplomatic and economic means.¹⁴⁴ Hostility toward PSI from that large and powerful country could limit its effectiveness and provide a source of unnecessary friction in international affairs, the potential consequences of which will not have been lost on member states such as Britain, France, and Germany.

¹⁴¹ See William Crane, *Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment*, 9 COLO. J. INT'L. ENVTL. L. & POL'Y 429, 437–38 (1998); Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT'L. ECON. L. 731, 742 (1998); Richard Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002). Steinberg points out that a similar approach was considered by U.S. trade negotiators during the 1970s, in the form of a "GATT-Plus regime" through which "the EC, the United States, and most industrialized countries would deepen trade liberalization among themselves, extending the benefits of the arrangements only to those willing to undertake the obligations." *Id.* at 358. As Steinberg explains, the result "would have been a two-tiered global trade regime, which would quietly pressure the developing countries into liberalizing or otherwise facing the trade and investment diversion associated with the more liberal GATT-Plus regime." *Id.*

¹⁴² John Kerin, *Fear US Will Push N Korea into Fight*, AUSTRALIAN, July 10, 2003, at 2.

¹⁴³ See John Kerin, *Russia Spurns Weapons Hunt Plan*, AUSTRALIAN, Oct. 14, 2003, at 2; Hamish McDonald, *Japan's Prominent Role in Coral Sea Exercise will Unsettle China*, SYDNEY MORNING HERALD, Sept. 15, 2003, at 8; Paul Richter & Sonni Efron, *U.S. and Allies Set to Search Vessels; Some Experts and Governments Warn that the Move to Curb Arms Traffic May Be Illegal*, L.A. TIMES, Sept. 10, 2003, at 3.

¹⁴⁴ See Hamish McDonald, *Beefed-Up Exercises in Coral Sea Making China Nervous*, SYDNEY MORNING HERALD, Sept. 9, 2003, at 10; McDonald, *Japan's Prominent Role in Coral Sea Exercise will Unsettle China*, *supra* note 143; Michael Richardson, *It's Full Steam Ahead in Hunt for Terror Arms Shipments*, STRAITS TIMES (Sing.), Oct. 25, 2003, available at LEXIS, News Library, Individual Publications File. On Russian entry into PSI, see *supra* note 17.

There are no references to preemptive self-defense in the principles agreed upon at the September 2003 Paris meeting.¹⁴⁵ Instead, there is considerable ambiguity. Bolton continues to insist that “[a]ctions taken under the PSI will be fully consistent with national legal authorities and relevant international law and frameworks,” without indicating whether, and to what degree, the relevant law allows or precludes preemptive action.¹⁴⁶

It is possible that Bolton has abandoned any attempt to include a preemptive self-defense element; as Rebecca Weiner has reported, “the deeper the initiative delves into issues of international law, the harder the coalition is likely to press for U.N. approval and support—an eventuality the United States is not entirely sanguine to face.”¹⁴⁷ Moreover, it is possible that U.S. shipping interests, and perhaps even the U.S. Navy, have weighed in in defense of the requirement of flag state consent. Yet another possibility, however, is that the absence of clarity is itself designed to work to the eventual advantage of Bolton’s early position: one has only to imagine what could happen once the initiative was firmly established and a vessel registered in a nonconsenting state were suspected of transporting WMD or missile technology on the high seas. As Bolton himself indicated in July 2003, the United States would likely interdict: “We are prepared to undertake interdictions right now and, if that opportunity arises, if we had actionable intelligence and it was appropriate, we would do it now.”¹⁴⁸ If the United States did interdict, it might not only claim preemptive self-defense but also assert that its claim is consistent with and supported by PSI. And this would in turn leave other PSI states with a choice: acquiesce in a legal claim that was backed up by a decisive, physical act of state practice or publicly protest, thus risking the considerable benefits offered by the rest of PSI as well as continued good relations with the United States.

PSI states are undoubtedly aware of this potential trap. Yet they are in the difficult position of having two potentially incompatible goals: restricting the proliferation of WMD, missiles, and associated technology, on the one hand, and on the other, reducing the risk that the United States will take forceful steps on its own. One of the ironies of contemporary international politics is that the Bush administration’s evident willingness to use force unilaterally and preemptively provides it with heightened influence in multilateral negotiations. From this perspective, the continued ambiguity on any preemptive self-defense element within PSI may have the effect of pushing other states into accepting the broadest and most effective consensual interdiction regime possible, since such a regime would greatly reduce the frequency with which the United States would be tempted to act alone.

In any event, PSI in its present form is primarily about states strengthening and enforcing existing national and international rules while taking advantage of the requirement of flag state consent to accord stop-and-search powers to each other. Contrary to some perceptions, the Bush administration devotes considerable attention to international law, and not just when it seeks to disentangle itself from existing obligations, or to shield itself from treaties and tribunals to which it chooses not to consent. From a global perspective, PSI as currently structured is not ideal. But given the very real problem that it seeks to address, and the alternative paths that the United States might take, this particular instance of à la carte multilateralism is worthy of support.

¹⁴⁵ DEPT OF STATE, PROLIFERATION SECURITY INITIATIVE: STATEMENT OF INTERDICTION PRINCIPLES, *supra* note 16.

¹⁴⁶ John R. Bolton, Remarks at Proliferation Security Initiative Meeting (Sept. 4, 2003), available at <<http://www.state.gov/t/us/rm/23801.htm>>. In his September 23, 2003, speech to the UN General Assembly, President George W. Bush described the agreed upon set of interdiction principles as “consistent with legal—current legal authorities.” See News Release, White House (Sept. 23, 2003), available at <<http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html>>.

¹⁴⁷ Rebecca Weiner, *Proliferation Security Initiative to Stem Flow of WMD Materiel*, Center for Non-Proliferation Studies, July 16, 2003, available at <<http://cns.miis.edu/pubs/week/030716.htm>>.

¹⁴⁸ Michael Evans, *US Plans to Seize Suspects at Will*, TIMES (London), July 11, 2003, at 23.